6-19-2013

State v. Parker Respondent's Brief Dckt. 38956

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, vs. RUSSELL JAMES PARKER, Defendant-Appellant.	)	No. 38956 Ada Co. Case No. CR-2010-15600

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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Nature Of The Case

Russell James Parker appeals from the judgment of conviction entered upon the jury verdict finding him guilty of lewd and lascivious conduct.

Statement Of The Facts And Course Of The Proceedings

Vanessa Marsh is T.S.'s mother, and during the summer of 2010, T.S. was three years old. (Tr., p.202, L.23 – p.203, L.6.) Vanessa had been a friend of Parker for a year and a half, and the two had an on-and-off romantic relationship for a few months until the fall of 2009 or winter of 2010. (Tr., p.204, Ls.11 – p.205, L.3.) When Vanessa worked at a "Big Smoke" store, T.S. stayed at a daycare facility until it was closed down in April of 2010. (Tr., p.203, Ls.20-21; p.205, Ls.4-12.) From the middle of April through June of 2010, Parker baby-sat T.S. at Vanessa's parents' house about 30 hours each week while Vanessa worked. (Tr., p.205, L.4 – p.206, L.18.)

Toward the end of the time period Parker baby-sat T.S., Vanessa noted several behavioral changes in T.S.: his potty training was "going down the drain," he acted more irritable and angry, he "started doing stuff to [Vanessa's] nephew," and he was having "a little bit of nightmares." (Tr., p.206, L.19 – p.207, L.5.) Vanessa became concerned that T.S. may have been "touched," and talked to Parker about her concerns, twice confronting him in her store, telling him that T.S. had accused him of doing something, but Parker would cut the conversation short, deny any wrongdoing, and then leave. (Tr., p.207, L.10 – p.208, L.20.) Based on her concerns, Vanessa contacted a

friend, Joy Heinbach, who began watching T.S. in early July of 2010. (Tr., p.208, L.21 – p.209, L.1.)

According to Vanessa, the scale was tipped causing her to contact police when T.S. awoke from a nightmare, screaming. (Tr., p.209, Ls.2-8.) Vanessa cooperated with Boise City Police Detective Bill Smith by making a "confrontation call" to Parker in which he insisted he had done nothing inappropriate to T.S. (Tr., p.209, Ls.14-24; p.221, Ls.14-22.)

Austin Marsh, Vanessa's brother, has one child, A.M., who was almost two years old during the summer of 2010. (Tr., p.251, L.15 – p.252, L.8.) Austin recalled two incidents involving T.S. and his son A.M. that concerned him. The first incident occurred between April and May of 2010: Austin walked into A.M.'s bedroom, where T.S. and A.M. were, and A.M.'s pants were down, his diaper was off and T.S. "had his mouth down there," and it "looked like he was going down on him" as if performing oral sex. (Tr., p.255, L.17 – p.257, L.8.) Austin said, "[T.S.], what are you doing?" and T.S. ran away, jumped over a small chair, and hid in the corner of a closet, refusing to talk to Austin. (Tr., p.257, L.23 – p.258, L.5.) After T.S. calmed down, he told Austin things that alarmed Austin, and Austin contacted Vanessa to relate what had happened. (Tr., p.258, L.15 – p.259, L.5.)

About a month later, while at work, Austin received a call from his wife telling him he needed to come home "because an incident happened again similar to the last one." (Tr., p.259, Ls.9-18.) When Austin arrived home, A.M. was screaming because T.S. "had bitten his bottom," which was evident by the bruise marks and bite marks on his bottom. (Tr., p.259, L.23 – p.260, L.10.) Austin picked T.S. up because he would not

stop screaming or kicking, and would not talk or look at Austin, which was not normal behavior for T.S. (Tr., p.260, Ls.20-25.) After T.S. calmed down, Austin asked him questions (without any names) about who would have shown him "anything like that . . . other than people that are changing your diaper." (Tr., p.251, Ls.3-12.) Based on T.S.'s response, Austin called Vanessa immediately. (Tr., p.251, Ls.17-22.)

Joy Heinbach, Vanessa's best friend, began baby-sitting T.S. the first part of July 2010, at Vanessa's request. (Tr., p.293, Ls.8-10; p.297, L.13 – p.298, L.18.) A couple of weeks later, Joy became alarmed when she saw T.S. having a nightmare during which he was in a fetal position, shaking, and saying things that caused her to be very upset and concerned, and to report it to his mother and the police. (Tr., p.298, L.19 – p.300, L.18.) Joy had known T.S. since he was 18 months old, and noticed that after she began baby-sitting him, he was "very different" -- shy, guarded, a little angry, and was "scared of the [pool] water all of a sudden." (Tr., p.300, L.25 – p.301, L.24.)

Detective Bill Smith initially interviewed Parker at "City Hall West" on about August 24, 2010, and Parker denied any type of sexual contact with T.S. (Tr., p.228, Ls.6-12; p.231, Ls.14-25; p.233, Ls.5-22.) After the interview, Detective Smith arranged a second interview for the first part of September in which Parker was mainly questioned by Detective Heatherley. (Tr., p.233, L.23 – p. 234, L.11.) During the subsequent interview Parker admitted to having touched T.S.'s penis with his mouth on two separate occasions – when Parker gave T.S. a "raspberry," and when Parker demonstrated for T.S. what acts adults should not be allowed to do with him. (Tr., p.317, L.17 – p.318, L.25; p.319, Ls.10-17.) A videotape recording of Parker's interview

(State's Exhibit 1) was admitted into evidence and published to the jury. (Tr., p.321, L.6 – p.324, L.7.) A brief summary of the relevant portions of Parker's interview follows:

(a) Parker said he was horsing around with T.S. after T.S. came out of the bathroom, and didn't notice T.S.'s pants were off. Parker picked T.S. up, flipped him over, and when he went to blow a raspberry on T.S., his mouth went to T.S.'s "pee-pee." After Parker blew the raspberry, he realized it was T.S.'s pee-pee, and not his belly, that his mouth had touched. (St. Ex. 1, 0:00 - 1:40.)

(b) When the detective asked "then what happened?" Parker answered, "that was it" and that he "freaked out." Parker then put his head down into his hands. (St. Ex. 1, 1:40 - 1:55.)

(c) The detective told Parker what he is doing is just a "little bit," and he needed to be straight forward on the whole thing because T.S. said "Russ sucked my penis." The detective asked Parker if he was trying to teach T.S. something, and Parker said "no . . . that was it." (St. Ex. 1, 1:55 - 2:36.)

(d) After the detective told Parker he had to come clean and talk to him about what happened, Parker said, "that happened, and then I explained to him this is what happens when you get older . . . and if people start doing it to you, if men do it to you, you tell them no, and I showed him the motions of what people do." When the detective asked what he meant, Parker explained, "when, if a guy comes down and tries sucking his cock, and I told him, explained to him." (St. Ex. 1, 2:55 - 3:41.)

(e) The detective asked Parker if he demonstrated on T.S., because T.S. said "Russ would suck my penis." The detective asked if Parker showed T.S. what not to let other people do, whether it's men or women who do it. Parker answered "yes," and added that he never showed T.S. again. (St. Ex. 1, 3:41 - 4:53.)

(f) When asked exactly what he did, Parker explained that he "stuck it in my mouth and that's it." When asked how long he sucked T.S.'s penis, Parker said "ten seconds." (St. Ex. 1, 4:58 - 5:23.)

During Parker's interview by Detective Heatherley, which lasted about three hours (Tr., p.319, Ls.10-17), the detective left the interview room and exchanged information with Detective Smith, who had been watching the last 30 or 45 minutes of

the interview on a live video feed. (Tr., p.234, L.18 – p.235, L.4; p.314, Ls.6-11.) Detective Smith had watched Parker admit to Detective Heatherley that when he picked T.S. up "and tried to blow a raspberry, . . . the child's penis accidentally touched his mouth[,]" and that he demonstrated "what should not be done to him . . . by putting his penis in his mouth for approximately ten seconds; and discussing erections." (Tr., p.238, Ls.1-12.) Detective Smith explained that when he went into the interview room:

> [Parker] [b]asically told me the same things. He admitted to the time when he picked up and tried to blow the raspberry and the child's penis accidentally touched his mouth.
>
> He admitted that he demonstrated the – what should not be done to him by bending over at the waist, when the child was standing on the floor, and putting his penis in his mouth for approximately ten seconds; and discussing erections.
>
> I also asked him if he had touched the boy's anus in any way.
>
> And he said his hand might have slipped up and touched his butt or butt cheek, but that he never put anything inside of it or anything like that.

(Tr., p.238, Ls.3-18.)

The state charged Parker with lewd conduct with a minor under sixteen. (R., pp.33-35.) After Parker's arraignment, he made a phone call to his mother in which he "probably" told her that he was "pretty screwed," and, although he did not remember telling her that the state "has got good evidence," he "could of" said that. (Tr., p.368, L.17 – p.369, L.15.)

After a trial, a jury found Parker guilty as charged. (R., p.118; Tr., p.414, Ls.19-20.) The district court entered judgment on the jury's verdict and imposed a unified sentence of thirty years with ten years fixed. (R., pp.126-129; Tr., p.444, L.23 - p.445, L.2.) Parker timely appeals. (R., pp.130-133.)

ISSUES

Parker states the issues on appeal as:

1. Did the district court err in admitting T.S.'s out-of-court statements through the video recording of Mr. Parker's second interrogation?

2. Did the State engage in one or more instances of misconduct, such that Mr. Parker is entitled to a new trial?

3. Was there such an accumulation of errors in this case that Mr. Parker was denied a fair trial?

(Appellant's Brief, p.7.)

The state rephrases the issues on appeal as follows:

1. Has Parker failed to establish that the district court committed error in admitting the detective's references to the victim's allegations during the videotaped police interview without conducting an I.R.E. 403 analysis; even if error, is such error harmless?

2. Has Parker failed to establish fundamental error in regard to his claims of prosecutorial misconduct?

3. Is Parker's claim of cumulative error meritless?

ARGUMENT

I.
Parker Has Failed To Establish That The District Court Committed Error In Admitting The Detective's References To The Victim's Allegations During The Videotaped Police Interview Without Conducting An I.R.E. 403 Analysis; Even If Error, Such Error Is Harmless

A. Introduction

During its case-in-chief, the state sought to introduce into evidence the videotape recording of Parker's police interrogation by Detective Moe Heatherley (St. Ex. 1). Parker objected to the admission of the videotape, arguing it contained hearsay statements by the victim ("T.S.") describing Parker's lewd conduct, and was prejudicial. (Tr., p.160, L.4 – p.161, L.22.) After reviewing the videotape, the district court admitted it over Parker's objections, but gave a limiting instruction to the jury. (Tr., p.172, L.23 - p.175, L.2; p.322, L.7 – p.323, L.21.) The district court ruled that the detective's references to the victim's statements were not hearsay because they were not offered for their content or truthfulness, and were necessary to provide context for Parker's responses. (Id.) The court declined to rule on whether the probative value of the detective's references to the victim's allegations was substantially outweighed by the danger of unfair prejudice under I.R.E. 403, explaining they were not "evidence" to be weighed since they could not be used to prove Parker's guilt. (Id.)

Parker argues on appeal that the district court abused its discretion in admitting the videotape at trial. (Appellant's Brief, pp.8-13.) Apparently conceding that the evidence on the tape was relevant, Parker argues only that the district court erred by failing "to balance the probative value of such evidence against its prejudicial effect, as is required under Idaho Rule of Evidence 403." (Id., p.10.) Parker, however, has failed

to establish that the district court erred in admitting the videotape with the detective's references to T.S.'s statements without first conducting an I.R.E. 403 weighing analysis. Even if the court erred, such error was harmless. State v. Perry, 150 Idaho 209, 221-222, 245 P.3d 961, 973-974 (2010) ("In Idaho, the harmless error test established in Chapman is now applied to all objected-to error.").

B. Standard Of Review

Whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice under I.R.E. 403 is a discretionary matter that will be disturbed on appeal only if the appellant demonstrates that the district court abused its discretion. State v. Enno, 119 Idaho 392, 406, 807 P.2d 610, 624 (1991); State v. Birkla, 126 Idaho 498, 500, 887 P.2d 43, 45 (Ct. App. 1994). A conviction will not be reversed for error unless a substantial right of the defendant is affected. I.C.R. 52; I.R.E. 103. In a criminal case, error in the admission of evidence will not result in a reversal if the error was harmless, as opposed to affecting a substantial right of the defendant's. State v. Gomez, 126 Idaho 700, 705, 889 P.2d 729, 734 (Ct. App. 1994).

C. Parker Has Failed To Show That The District Court Erred By Admitting The Detective's References To T.S.'s Allegations To Provide Context For Parker's Statements During His Videotaped Police Interview

At the outset, it is important to delineate what "evidence" was ruled admissible by the district court. After reviewing Parker's videotaped interview by Detective Heatherley, the district court ruled that the detective's references to T.S.'s allegations were admissible only to show the context of Parker's responses. (Tr., p.172, L.24 – p.174, L.22; see R., p.99 (Jury Instr. No. 13(a).) The court explained:

THE COURT: . . . It is also unfair to the State to present a tape which is so totally chopped up that you cannot understand the context of the interview. And in viewing this interview, that's what I believe the circumstance would be in this case.

Sometimes you are just in a circumstance where you just have to place a context on the interview and the responses, and advise the jury that this purely [sic] for context. I mean, the courts have recognized that, and that's why we have the availability of the limiting instruction. And the response with regard to balancing of 403, under 403, is not an issue here, in this Court's opinion, because I specifically told the jury: "This is not evidence."

[DEFENSE COUNSEL]: Okay.

THE COURT: "It is not evidence that you weigh."

And as a result, there is – the balancing test, in this Court's opinion, does not apply because I'm telling them it is not evidence.

"This is not admissible evidence. This is not evidence you can use to find guilt. The only thing this is provided for is context."

I don't know how much clearer you can make that to the jury and balance the interests of both the defendant and the State, because both parties are entitled to a fair trial.

To do what I think you are requesting to be done, that every portion where the officer says, "Well," so and so "said," be removed is just going to leave the defendant making a series of statements that are totally out of context from what the interview was.

. . . .

But what I'm telling that [sic] jury is: "This is only context. It is not evidence. You can't find him guilty based upon this these [sic] statements. It is merely what the officer said."

(Id.)

Just after the videotape of Parker's interview with Detective Heatherley was admitted into evidence, the court instructed the jury pursuant to Jury Instruction No. 13(a) as follows:

> Ladies and gentlemen, you are about to see a videotape interview of the defendant by the police.
>
> . . . .
>
> During this interview the police officer states at several points what he says the alleged victim stated about the defendant's behavior. *You are advised that these comments about what the alleged victim may have said to the police are hearsay and are not evidence in this case.*
>
> They have remained in the tape only for the limited purpose of placing in context the interview and the defendant's responses to questions asked and statements made.
>
> You are further advised that police officers are allowed during this interrogation to make statements which may not be totally true or may even be totally false, in an effort to gain response from a suspect.
>
> Because the alleged statements by the alleged victim were not taken under oath and were not subject to cross-examination, *they are not evidence*. You cannot find the defendant either guilty or not guilty based upon statements made by officer [sic] about what the alleged victim did or did not say to the officer.
>
> You are the sole determiners of the facts of this case. The factual determinations which you make, however, must be based upon evidence. *What a police officer says the alleged victim said or did not say is not evidence* upon which you may base your verdict; only the statement made by the defendant in response to the questions asked him by the officer is evidence in this case.

(Tr., p.322, L.7 – p.323, L.21; see R., p.99 (Jury Instr. No. 13(a) (emphasis added).)

The district court ruled, and its limiting instruction told the jury, that the detective's statements about what T.S. said was not evidence in the case, and could not be used in reaching a verdict. "[I]t is presumed that the jury follows a limiting instruction." State v. Pugsley, 128 Idaho 168, 175, 911 P.2d 761, 768 (Ct. App. 1995). See also State v. Gomez, 151 Idaho 146, 156, 254 P.3d 47, 57 (Ct. App. 2011) ("We presume that the jury followed the district court's [limiting] instructions."). Therefore, in regard to the

content of the statements the detective attributed to T.S., the district court correctly concluded it did not have to weigh the probative value of those statements against the danger of unfair prejudice under I.R.E. 403 because the content of those statements was not evidence. Because the court made it clear to the jury that the content of T.S.'s allegations was not evidence, it would have been nonsensical for the court to conduct a Rule 403 balancing test for the admissibility of evidence.

The district court admitted Detective Heatherley's references to T.S.'s allegations for the sole purpose of providing *context* for Parker's responses. See State v. Seigel, 137 Idaho 538, 540, 50 P.3d 1033, 1035 (Ct. App. 2002) (detective's statements of what others told him about sexual offense "were not offered to prove their truth but to show the context of Siegel's own admissions made during the conversation. It is well established that out-of-court statements are not barred by the hearsay rule when offered to show their effect on the listener."); State v. Cordova, 137 Idaho 635, 639-42, 51 P.3d 449, 453-56 (Ct. App. 2002) (admitting officer's statements questioning defendant's veracity to show context). To the extent the district court may have been required to conduct an I.R.E. 403 balancing analysis of the context of T.S.'s statements, the failure to do so was harmless.

In State v. Floyd, 125 Idaho 651, 873 P.2d 905 (Ct. App. 1994), the Idaho Court of Appeals found error by the district court for failing to conduct an I.R.E. 403 analysis before admitting a tape recording of the defendant's statement into evidence. The Court of Appeals further held that "Floyd must show that the district court's failure to properly perform its role resulted in a ruling that affected a substantial right[,]" pursuant to I.R.E. 103. Id. In deciding that issue, the Court of Appeals "reviewed Floyd's

statement independently of the district court's action[,]" and concluded "that the only proper result that could have been reached by the district court would have been to allow its admission."[1] Id. Although decided prior to Perry, and based on a different harmless error standard, Floyd shows it is appropriate for an appellate court to independently consider the admissibility of evidence under I.R.E. 403 when the district court has failed to do so. As in Floyd, here "the only proper result that could have been reached by the district court would have been to allow" the admission of the detective's assertions to Parker of what T.S. had alleged for the sole purpose of giving context to Parker's responses.

Under I.R.E. 403, relevant evidence may be excluded if its probative value is substantially outweighed by the "danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." By admitting the detective's statements to Parker about what T.S. had alleged, the district court minimized the possibility that the jury could be confused or misled about Parker's responses. As the court explained, it would be "unfair to the State to present a tape which is so totally chopped up that you cannot understand the context of the interview[,]" and "leave the defendant making a series of statements that are totally out of context from what the interview was." (Tr., p.172, L.24 – p.173, L.2; p.174, Ls.6-9.) T.S.'s statements also had probative value by eliminating any possibility Parker's responses may have been viewed as something other than factual assertions and admissions – not, for example, statements made in jest, intended as hypothetical scenarios, or under threats or duress. In short, the context of Parker's

[1] Unlike here, the district court in Floyd did not review the taped statement before admitting it into evidence. Floyd, 125 Idaho at 654, 873 P.2d at 908.

admissions had probative value which was not "substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury" under Rule 403. Therefore, the admission of the videotaped interview, including the detective's references to T.S.'s statements, was proper.

This Court should conclude, based upon its independent review under I.R.E. 403 of the admissibility of the detective's references to T.S.'s statements to show context for Parker's responses, that those statements were admissible and the district court committed no error in admitting them. Further, the state relies upon the evidence presented at trial, as set forth in the Statement of Facts, supra, to show that, beyond a reasonable doubt, any error in admitting the detective's references to T.S.'s statements was harmless. Perry, 150 Idaho at 221-222, 245 P.3d at 973-974.

D. Even If The District Court Erred In Admitting The Detective's References To T.S.'s Allegations During Parker's Videotaped Interview, Such Error Was Harmless

Even if this Court finds that the district court erred in admitting the detective's references to T.S.'s allegations to show the context of Parker's responses without conducting an I.R.E. 403 balancing analysis, and that the evidence would not have been admissible under that rule, such an error is harmless. "The standard for determining whether error is harmless is 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction and that the court must be able to declare a belief that it was harmless beyond a reasonable doubt.'" State v. Jones, 125 Idaho 477, 488, 873 P.2d 122, 133 (1994) (quoting State v. Pizzuto, 119 Idaho 742, 762, 810 P.2d 680, 700 (1991)); see also State v. Zimmerman, 121

Idaho 971, 976, 829 P.2d 861, 865 (1992) (to hold erroneous admission of evidence harmless, the court must "'declare a belief, beyond a reasonable doubt, that there was no reasonable possibility that [the] evidence complained of contributed to the conviction'") (brackets original) (quoting State v. Sharp, 101 Idaho 498, 507, 616 P.2d 1034, 1043 (1980)).

Applying the standard of whether the evidence complained of contributed to the conviction shows, beyond a reasonable doubt, that the alleged error was harmless. The evidence of Parker's guilt as to his charged conduct was overwhelming. The testimony and evidence presented at trial, as set forth in the Statement of Facts, supra, are relied upon to show, beyond a reasonable doubt, that Detective Heatherley's references to T.S.'s allegations during his interview with Parker could not have affected the jury's decision to convict him of lewd and lascivious conduct.

II.
Parker Has Failed To Show Fundamental Error In His Unpreserved Claims Of Prosecutorial Misconduct

A. Introduction

Parker claims several of the prosecutor's actions at trial, which were not objected to, were prosecutorial misconduct amounting to fundamental error. (Appellant's Brief, pp.13-44.) Specifically, Parker claims the prosecutor committed misconduct by: (a) conveying the substance of T.S.'s "sleep-talk" to the jury, in contravention of the district court's ruling that sleep-talk was not admissible for any purpose (id., pp.14-22); (b) arguing during closing argument that the jury should infer that T.S. "made damning disclosures concerning Mr. Parker" and "believe those disclosures for their truth[,]" in

violation of the prosecutor's representation that he would only offer the fact that T.S. made statements to show the effects on the various listeners (id., pp.23-28); (c) commenting on Parker's invocation of his Fifth Amendment rights (id., pp.28-32); (d) offering opinion testimony about Parker's lack of truthfulness and/or his guilt (id., pp.33-39); and (e) resorting to juror sympathy for the victim and/or anger at Parker in order to convict him (id., pp.39-44). Review of these claims shows no fundamental error.

B. Standard Of Review

"It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal." State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000). Whether the issue was preserved is a "threshold" inquiry. State v. Stevens, 115 Idaho 457, 459, 767 P.2d 832, 834 (Ct. App. 1989).

C. Standard Of Review And General Legal Standards Governing Claims Of Prosecutorial Misconduct

"[T]he standard of review governing claims of prosecutorial misconduct depends on whether the defendant objected to the misconduct at trial." State v. Severson, 147 Idaho 694, 715, 215 P.3d 414, 435 (2009). If the alleged error was followed by a contemporaneous objection at trial, the defendant bears the initial burden on appeal of establishing that the complained of conduct was improper. State v. Ellington, 151 Idaho 53, 59, 253 P.3d 727, 733 (2011); Perry, 150 Idaho at 227, 245 P.3d at 979. "Where the defendant meets his initial burden of showing that a violation occurred, the State then has the burden of demonstrating to the appellate court beyond a reasonable doubt

that the constitutional violation did not contribute to the jury's verdict." Perry, 150 Idaho at 227-228, 245 P.3d at 979-980. When, on the other hand, a defendant fails to timely object at trial . . . the conviction will be set aside for prosecutorial misconduct only upon a showing by the defendant that the alleged misconduct rises to the level of fundamental error. Id. at 228, 245 P.3d at 980.

Whether preserved by objection at trial or reviewed for fundamental error, a mere assertion or finding that a particular question or statement was objectionable or improper is insufficient to establish prosecutorial misconduct. As explained by the United States Supreme Court: "[I]t is not enough that the prosecutors' remarks were undesirable or even universally condemned. The relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (internal quotations and citations omitted); see also Smith v. Phillips, 455 U.S. 209, 219 (1982) ("[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor."); State v. Reynolds, 120 Idaho 445, 451, 816 P.2d 1002, 1008 (Ct. App. 1991) (the function of appellate review is "not to discipline the prosecutor for misconduct, but to ensure that any such misconduct did not interfere with the defendant's right to a fair trial").

D. Parker Has Failed To Show Any Prosecutorial Misconduct Amounting To Fundamental Error

An unpreserved issue may only be considered on appeal if it "constitutes fundamental error." State v. Johnson, 149 Idaho 259, 265, 233 P.3d 190, 196 (Ct. App. 2010). In the absence of an objection "the appellate court's authority to remedy that

error is strictly circumscribed to cases where the error results in the defendant being deprived of his or her Fourteenth Amendment due process right to a fair trial in a fair tribunal." Perry, 150 Idaho at 224, 245 P.3d at 976. Review without objection will not lie unless (1) the defendant demonstrates that "one or more of the defendant's unwaived constitutional rights were violated;" (2) the constitutional error is "clear or obvious" on the record, "without the need for any additional information" including information "as to whether the failure to object was a tactical decision;" and (3) the "defendant must demonstrate that the error affected the defendant's substantial rights," generally by showing a reasonable probability that the error "affected the outcome of the trial proceedings." Id. at 226, 245 P.3d at 978.

Parker makes several claims of prosecutorial misconduct that he argues constitute fundamental error. (Appellant's Brief, pp.13-44.) Each of these claims, however, fails on one or more prongs of the fundamental error test.

1. Conveying T.S.'s "Sleep-Talk" To The Jury

(a) The Prosecutor Did Not Violate Any Court Order

After jury selection, the prosecutor informed the court that he intended to introduce at trial, under the excited utterance exception to the hearsay rule, statements by T.S. that were overheard by a daycare provider, Joy Heinbach -- that T.S. was "suffering from a nightmare and does say things to the effect of, 'No, Russ, don't touch me.'" (Tr., p.164, Ls.18-24; p.169, Ls.1-3.) Parker's counsel objected to the admission of such evidence, citing State v. Zimmerman, 121 Idaho 971, 829 P.2d 861 (1992), for the principle that "sleep talk contains no probative value regarding actual events or the

identities of actual participants." (Tr., p.165, L.20 – p.167, L.15.) The court took the issue under advisement to give itself an opportunity to read Zimmerman and make a ruling before Joy Heinbach testified. (Tr., p.168, L.16 – p.169, L.10.) Before the court made its ruling, the prosecutor stated in his opening statement, and elicited testimony by T.S.'s mother, Vanessa Marsh, that T.S. had experienced nightmares and said things during them that concerned her about Parker's conduct, and caused her to contact the police. (Tr., p.192, Ls.14-22; p.196, Ls.2-9; p.223, Ls.14-24.)

Just prior to Joy Heinbach's testimony, the prosecutor renewed his request to ask her about the "nightmare statements" made by T.S., but changed the basis for admitting such testimony from an "excited utterance" hearsay exception to the non-hearsay "effect on the listener" ground. (Tr., p.282, L.23 – p.283, L.12.) The prosecutor acknowledged that under State v. Zimmerman, 121 Idaho 971, 829 P.2d 861 (1992), such statements could not "come in as evidence" (Tr., p.282, Ls.19-22), and then made the following offer of proof:

> [Joy Heinbach] hears the nightmare statements and she's concerned enough to – she hears the – she hears the child say, "No, Russ, no touch. Don't touch my pee-pee," and she calls Vanessa right away, which starts the ball rolling for law enforcement to become involved, or the police are called.
>
> So I do believe those statements are important for effect on the listener, and I would ask the Court for some guidance on that.

(Tr., p.283, Ls.6-12.)

As the prosecutor's comments show, he sought to elicit, through Joy Heinbach, the specific statements she heard T.S. utter while he was having a nightmare. However, the court determined that the statements were not admissible, explaining:

> Well, I'm going to find that the statements that were made while . . . the alleged victim was asleep and dreaming are not admissible. They are not admissible as direct evidence, and they are not admissible because their prejudicial effect outweighs their probative value in terms of the evidence presented to the jury.
>
> Where our Supreme Court – or our appellate courts have held clearly that things that are said while someone is sleeping or having a nightmare are not admissible evidence, I think it would be inappropriate to allow that testimony to go to the jury for any purpose, and I'm going to rule that that is not admissible.

(Tr., p.283, L.16 – p.284, L.5.)

The court ruled that the statements T.S. made during his nightmare were inadmissible for any purpose, which, based on the state's motion, precluded it from presenting statements T.S. made during his sleep-talk as an excited utterance, to show their effect on the listener, or for any other purpose. The ongoing issue concerning T.S.'s sleep-talk was clearly about whether the words T.S. uttered could be admitted for another purpose other than their truth. The court did not rule that the state could not present testimony of the fact that T.S. had a nightmare and engaged in sleep-talk that caused Joy Heinbach to report what she heard to T.S.'s mother and the police. When she finally testified, Joy Heinbach explained, without any objection, that she became alarmed when she observed T.S. having a nightmare, during which he was in a fetal position, shaking, and saying things that caused her to be concerned, upset, and to report it to his mother and the police. (Tr., p.298, L.19 – p.300, L.18.)

Contrary to Parker's allegation, the prosecutor did not violate any order by the district court. The state never disclosed to the jury the actual statements made by T.S. during his sleep-talk. Parker's attempt to characterize the prosecutor's actions as violations of the court's orders is not borne out by the record, and the factual basis for

his claim of fundamental error based on prosecutorial misconduct for references to T.S.'s sleep-talk is fatally flawed.

(b) Parker Has Failed To Demonstrate Fundamental Error

Nonetheless, Parker contends his trial was infected with fundamental error because "the State offered copious arguments and evidence concerning T.S.'s 'sleep talk,' and thereby conveyed the substance of that 'sleep talk' to the jury[,]" contrary to both the court's initial ruling,[2] and its ultimate ruling that such evidence was not admissible for any purpose. (Appellant's Brief, pp.14-15.) Despite Parker's assertion that his state and federal constitutional rights to a fair trial and due process have been violated (see Appellant's Brief, p.20), the only possible constitutional right invoked by Parker's argument that the prosecutor improperly discussed or elicited testimony about T.S.'s "sleep-talk" is Parker's Sixth Amendment Confrontation Clause right.[3] However,

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[2] Although Parker contends "the prosecutor's opening statement and . . . Ms. Marsh's testimony were offered in violation of the district court's *admonishment* that no such evidence or argument should be offered until the court had ruled on its admissibility[,]" (Appellant's Brief, p.19 (emphasis added)), the state cannot discern where the record reflects such admonishment. The district court's query as to when Joy Heinbach would be testifying, and accordingly, when a decision on the state's request was needed (Tr., p.168, L.19 – p.169, L.10), hardly constitutes an "admonishment."

[3] Parker alleges his federal and state constitutional rights to a "fair trial" and "due process" have been violated. (Appellant's Brief, p.20.) However, not all prosecutorial misconduct violates a specific constitutional right. As made clear by the Court in Perry, "'where ... the asserted error relates not to infringement upon a constitutional right, but to violation of a rule or statute, ... the "fundamental error" doctrine is not invoked.'" Perry, slip op. at 19 (ellipses original) (quoting State v. Kirkwood, 111 Idaho 623, 626, 726 P.2d 735, 738 (1986)).

Parker is attempting, in essence, to engraft the rules of evidence into a constitutional provision. To say that the prosecutor's references to T.S.'s nightmare and disturbing sleep-talk infringed on his right to a fair trial and due process is to say that any error, no matter how slight, would be a constitutional error necessitating reversal.

he has failed to establish fundamental error under Perry by showing a violation of that constitutional right (or a violation of his rights to a fair trial and due process), much less that such violation is clear on the record and is not harmless.

The Confrontation Clause prevents the government from using evidence of out-of-court "testimonial statements" unless the declarant is unavailable and the defendant has had the prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 59 (2004); State v. Hooper, 145 Idaho 139, 143, 176 P.3d 911, 915 (2007). The primary evil at which the Clause is aimed is the government's gathering of *ex parte* evidence with the purpose of using that evidence at a later trial. Crawford, 541 U.S. at 50-52; Hooper, 145 Idaho at 143, 176 P.3d at 915. A statement is testimonial when the circumstances surrounding the making of the statement objectively show that the primary purpose of the interrogation is to gather evidence for use in prosecution. Davis v. Washington, 547 U.S. 813, 822 (2006); Hooper, 145 Idaho at 143-44, 176 P.3d at 915-16. Thus, statements made in response to police questioning while police are investigating a crime are testimonial, but statements made to police or their agents while the declarant is seeking emergency assistance are not. Davis, 547 U.S. at 822; Hooper, 145 Idaho at 143-44, 176 P.3d at 915-16. Likewise, "[s]tatements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment" are not testimonial. Giles v. California, 554 U.S. 353, 375-376

Such references are not the equivalent of establishing that "the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden, 477 U.S. at 181. Appellants should not prevail on such speculative claims of deprivation of amorphous rights, but must rely on actual infringement of specific rights. See U.S. v. Marshall, 526 F.2d 1349, 1355 (9th Cir. 1975). Here, the only constitutional right remotely in issue is Parker's Sixth Amendment right to confrontation.

(2008). Parker can point to no actual "statements" made by T.S. during his nightmare or "sleep-talk" that were admitted at trial, much less statements that qualify under Crawford as "testimonial."

First, there were no "statements" made by T.S. that were presented at trial for Parker to confront. The statements made by T.S. during his nightmare (e.g., "No, Russ, No touch. Don's touch my pee pee") were *never* disclosed to the jury. Apparently acknowledging that fact, Parker asserts that the state's arguments and evidence concerning T.S.'s sleep-talk "*conveyed the substance* of that 'sleep talk' to the jury." (Appellant's Brief, p.15 (emphasis added).) Parker's contention is not supportable by fact or law. The state was entitled to present testimony that T.S. had a nightmare during which he made non-specified statements which caused Joy Heinbach to report what she had heard to T.S.'s mother and the police.[4] Certainly the jury could have inferred that T.S.'s sleep-talk statements were related to Parker's sexual misconduct. However, Parker has not provided any authority to show that such an inference is

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[4] Idaho Rule of Evidence 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A statement is not hearsay if it is not offered for the truth of the matter asserted. State v. Scroggie, 110 Idaho 103, 112, 714 P.2d 72, 81 (Ct. App. 1986), *abrogated* by State v. Porter, 142 Idaho 371, 128 P.3d 908 (2005); State v. Ziegler, 107 Idaho 1133, 1135, 695 P.2d 1272, 1274 (Ct. App. 1985). Even if Joy Heinbach would have testified about what T.S. *specifically* said during his nightmare, the court could have ruled such testimony admissible as non-hearsay. See State v. Seigel, 137 Idaho 538, 540-41, 50 P.3d 1033, 1035-36 (Ct. App. 2002) ("It is well established that out-of-court statements are not barred by the hearsay rule when offered to show their effect on the listener."); Scroggie, 110 Idaho at 112, 714 P.2d at 81 (neighbor's testimony that he heard a young male voice proclaim "No Dad, don't do this. Let's leave" was not for the purpose of proving the truth of the overheard statement, and was, therefore, not hearsay.).

tantamount to "convey[ing] the substance" of T.S.'s sleep-talk to the jury to the point of constituting a "statement" for purposes of the Confrontation Clause. Inasmuch as T.S.'s actual sleep-talk statements were not admitted at trial, the Confrontation Clause is not implicated.

Moreover, T.S.'s statements during his nightmare were not "testimonial" under Crawford. T.S. was not being interrogated or questioned at all, much less by law enforcement, when he made the challenged comments. He was having a nightmare when he spontaneously said things disconcerting enough to cause Joy Heinbach to report them. Because T.S.'s sleep-talk was not "testimonial," the Confrontation Clause does not apply. See Davis, 547 U.S. at 821 ("It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause."); Michigan v. Bryant, —— U.S. ——, 131 S.Ct. 1143, 1152–53 (2011) (confirming that Crawford limits the reach of the Confrontation Clause to testimonial statements); Whorton v. Bockting, 549 U.S. 406, 420 (2007) ("the Confrontation Clause has no application to [out-of-court non-testimonial] statements [that were not subject to prior cross-examination] and therefore permits their admission"). Parker has failed to show any violation of a constitutional right.

Because Parker has failed to show any constitutional violation, he is unable to show that a constitutional violation is "clear or obvious" on the record, without the need for any additional information, including whether trial counsel's failure to object was a tactical decision. Perry, 150 Idaho at 226, 245 P.3d at 978. As noted, Parker has not presented any authority to support his argument that, because the jury was informed of

the fact -- vis-à-vis the specific words -- that T.S. had a nightmare in which he made disturbing comments, the jury was presented with the equivalent of a "statement" by T.S. falling within the Confrontation Clause. Nor has Parker provided any authority suggesting T.S.'s sleep-talk was testimonial under Crawford. Even if the "statement" and "testimonial" requisites of Crawford were in dispute in regard to T.S.'s sleep-talk, it is still not clear or obvious on the record that a constitutional violation occurred. Moreover, Parker's trial counsel may have decided to not object for the simple reason that the fact that T.S. had a nightmare and engaged in sleep-talk was not ruled inadmissible by the district court – only the use of the actual statements made by T.S. (even for non-hearsay purposes) were held inadmissible.

Finally, Parker cannot meet his burden of demonstrating prejudice by showing a reasonable probability that the error "affected the outcome of the trial proceedings." Perry, 150 Idaho at 226, 245 P.3d at 978. The testimony and evidence presented at trial, as set forth in the Statement of Facts, supra, are relied upon to show that Parker cannot demonstrate any prejudice from the prosecutor's references and witnesses' testimony about T.S.'s nightmare and sleep-talk. Moreover, the fact that Parker confessed to both Detective Heatherley and Detective Smith that he committed two separate *acts* constituting lewd and lascivious conduct, left the jury, practically speaking,[5] with only the decision of whether Parker had the requisite sexual *intent* at the time he committed the acts. Even if the substance of T.S.'s sleep-talk statements is

[5] Parker testified that he confessed to a lewd and lascivious act because he was "[j]ust giving [the detectives] what they wanted so [he] could leave." (Tr., p.375, Ls.16-20.) Whatever Parker may have believed about his chances of being released, it seems highly unlikely he would have concluded they would improve once he confessed to committing lewd conduct.

deemed to have been conveyed to the jury, because the sleep-talk referred to acts which Parker admitted, but said nothing about his intent, they could not have affected the outcome of the jury's verdict.

2. Arguing That The Jury Should Infer T.S. Made Damning Disclosures That Should Be Believed

(a) The Prosecutor Did Not Ask The Jury To Consider T.S.'s Statements As Substantive Evidence

After jury selection, the district court asked whether the state intended to use other statements made by T.S. (Tr., p.164, Ls.2-15.) The prosecutor informed the court that the state did not intend to introduce T.S.'s statements, but "[i]t does intend to talk about the fact that the witnesses that are on the stand did ask the victim pointed questions and did respond to the answers it [sic] got. But it doesn't intend to introduce the statements that the victim makes to prove the matter asserted." (Tr., p.165, Ls.8-15.) During closing argument, the prosecutor recounted the trial testimony of Vanessa Marsh, Austin Marsh, and Joy Heinbach, telling the jury that after they heard statements by T.S., they had concerns which caused them to keep T.S. away from Parker and to call the police. (Tr., p.388, Ls.16-21; p.392, Ls.8-11; p.394, Ls.13-15.)

On appeal, Parker contends it was fundamental error for the prosecutor to violate his own representation that he would only present the fact that T.S. made statements to people[6] in order to show the effects the statements had on them. (Appellant's Brief, pp.23-28.) Parker specifically alleges, "the prosecutor implied repeatedly in his summation that the jury should: (a) infer that T.S. made damning disclosures

[6] Parker includes closing argument comments the prosecutor made in regard to sleep-talk statements made by T.S. that were heard by the baby-sitter, Joy Heinbach. (Appellant's Brief, p.26.)

concerning Mr. Parker, and (b) believe those disclosures for their truth." (Appellant's Brief, p.26.) Parker's argument is factually baseless.

The only closing argument comments by the prosecutor Parker cites as misconduct are the following:

> We know that [T.S.] spoke to Austin, spoke to Vanessa, spoke to Joy, and he told them things that made them concerned enough that Vanessa separated [T.S.] from the defendant, Russell Parker, and also serious enough that she called the police.

(Tr., p.388, Ls.16-21.)

> We also know, as I have already said, that [T.S.] says things to his family, to Joy, that make them remove [T.S.] from the defendant's presence.

(Tr., p.392, Ls.8-11.)

> And again, [T.S.] made statements to Vanessa and Austin that make them move [T.S.] away from the defendant's care.

(Tr., p.394, Ls.13-15.)

(See Appellant's Brief, p.26.)

The above-cited comments by the prosecutor were completely in keeping with his representation to "talk about the fact that the witnesses . . . did ask the victim pointed questions and did respond to the answers it [sic] got." (Tr., p.165, Ls.10-13.) Each of the prosecutor's comments recalls testimony that T.S. made statements which caused the witnesses to respond in several ways. (See Tr., p.208, L.21 - p.209, L.13; p.261, Ls.17-22; p.299, L.12 – p.300, L.18.) Although the prosecutor told the jury that T.S. said things about Parker which were concerning and caused various responses, T.S.'s statements were never presented to the jury.

Inasmuch as T.S.'s statements were not admitted at trial for any purpose, the prosecutor did not breach his own representation that he would not "introduce the statements that the victim makes to prove the matter asserted." (Tr., p.165, Ls.13-15.) Parker's claim of fundamental error, based on the allegation that the prosecutor impermissibly introduced T.S.'s statements for their truth, is belied by the factual record.

(b) Parker Has Failed To Demonstrate Fundamental Error

Parker asserts fundamental error based upon prosecutorial misconduct[7] for arguing, during closing argument, that T.S.'s statements should be believed for their truth. (Appellant's Brief, pp.23-28.) As noted, T.S.'s statements were not introduced at trial through testimony, or recited by the prosecutor during closing argument. Nonetheless, Parker contends that "the prosecutor *implied* repeatedly in his summation that the jury should . . . *infer* that T.S. made damning disclosures . . . and believe those disclosures for their truth." (Appellant's Brief, p.26 (emphasis added).) Parker's claim fails.

Parker's argument that the prosecutor implied that T.S. made damning disclosures is a non-sequitur. Any reasonable juror would have concluded from the testimony presented at trial that T.S. had said something about Parker to Vanessa Marsh, Austin Marsh, and Joy Heinbach that warranted their concern. It is well settled that both sides have traditionally been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom. See State v. Sheahan, 139

[7] Parker asserts violations of "his right to a fair trial and due process of law[,]" and the Sixth Amendment's Confrontation Clause. (Appellant's Brief, p.27.)

Idaho 267, 280, 77 P.3d 956, 969 (2003); State v. Phillips, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007). It was not improper for the prosecutor to imply, or even state directly, what the evidence at trial reasonably showed.

Moreover, because the jury was never informed of what T.S. actually said in those statements, it could not have been asked to "believe those disclosures for their truth." Although the jury was able to deduce that T.S. had said something unfavorable about Parker, what T.S. actually said was not disclosed to the jury; therefore, the jury could not have been asked to believe it for its truth. Parker's assertion that the prosecutor argued, contrary to his representation, that T.S.'s statements should be believed for their truth as substantive evidence, is not supported by the record.

Parker's claim of fundamental error here is very similar to his "sleep-talk" claim previously discussed.[8] The state's analysis and reasoning in regard to Parker's "sleep-talk" issue, set forth in this Respondent's Brief at Argument II, §1(b), supra, is fully incorporated and relied upon here. In sum, Parker has failed to show that under Perry: (1) a violation of a constitutional right, (2) the violation is clear or obvious on the record, and (3) the violation is not harmless. Perry, 150 Idaho at 226, 245 P.3d at 978. In regard to Parker's claim that his Sixth Amendment right to confrontation was violated, because T.S.'s comments were neither "statements" used at trial nor "testimonial" under

[8] For the most part, substituting T.S.'s statements to Vanessa Marsh, Austin Marsh, and Joy Heinbach in place of T.S.'s nightmare "sleep-talk" is the only modification needed to conform the previous "sleep-talk" argument to the current argument. Other differences relate to Perry's requirement that there be a "clear or obvious" constitutional violation. First, Parker's trial counsel may not have objected to the prosecutor's closing argument because he did not believe the prosecutor violated his own representation that he would not offer T.S.'s statements for their truth -- vis-à-vis, in regard to the "sleep-talk" issue, a court ruling. Also, the nature of Parker's own argument, that the prosecutor "implied" or asked the jury to "infer" what T.S.'statements were, does not show clear or obvious error.

Crawford, 541 U.S at 59, the Confrontation Clause does not apply. See Davis, 547 U.S. at 822; Giles, 554 U.S. at 375-376. Parker has failed to show, under any constitutional provision, that the prosecutor's closing argument constituted fundamental error.

3. Commenting On Parker's Fifth Amendment Right To Silence

(a) Introduction

Detective Bill Smith testified that he initially interviewed Parker at "City Hall West" on about August 24, 2010, and Parker denied that any type of sexual contact had occurred. (Tr., p.228, Ls.6-12; p.231, Ls.14-25; p.233, Ls.5-22.) After the initial interview, Detective Smith arranged a second interview for the first part of September in which Parker was mainly questioned by Detective Heatherley. (Tr., p.233, L.23 – p. 234, L.11.) During Parker's interview by Detective Heatherley, which lasted about three hours (Tr., p.319, Ls.10-17), the detective left the interview room and exchanged information with Detective Smith, who had been watching the last 30 or 45 minutes of the interview on a live video feed. (Tr., p.234, L.18 – p.235, L.4; p.314, Ls.6-11.)

Detective Smith testified that he had watched Parker admit to Detective Heatherley that he when he picked T.S. up "and tried to blow a raspberry, . . . the child's penis accidentally touched his mouth[,]" and that he demonstrated "what should not be done to him . . . by putting his penis in his mouth for approximately ten seconds; and discussing erections." (Tr., p.238, Ls.1-12.) When Detective Smith went into the interview room, Parker admitted the same things before ending the interview. The detective testified in the following colloquy:

A. Basically told [sic] me the same things. He admitted to the time when he picked up and tried to blow the raspberry and the child's penis accidentally touched his mouth.

He admitted that he demonstrated the – what should not be done to him by bending over at the waist, when the child was standing on the floor, and putting his penis in his mouth for approximately ten seconds; and discussing erections.

I also asked him if he had touched the boy's anus in any way.

And he said his hand might have slipped up and touched his butt or butt cheek, but that he never put anything inside of it or anything like that.

Q. *How did the interview end?*

A. *As I was talking to him about these things, he said, "I'm done."*

And since I had promised him that he could leave whenever he wished to leave, I took that as a sign that he did not want to talk to us any more. So I talked to him for just a minute to make sure he was okay, and then I allowed him to leave.

(Tr., p.238, L.3 – p.239, L.2 (emphasis added).)

Detective Smith's testimony that Parker said "I'm done" after being interviewed for three hours merely establishes how Parker's interview was concluded, and was not elicited for the purpose of having the jury infer guilt from Parker's "silence." Parker has failed to demonstrate fundamental error because he cannot show a violation of his Fifth Amendment right to silence, that such violation is "clear or obvious" on the record, or that, even assuming error, there is a reasonable probability the error affected the outcome of the trial. Perry, 150 Idaho at 226, 245 P.3d at 978.

(b) Parker Has Failed To Demonstrate Fundamental Error

On appeal, Parker alleges fundamental error occurred when the prosecutor elicited a comment from Detective Smith about Parker's invocation of his Fifth Amendment right to silence. (Appellant's Brief, pp.28-32.) Although the detective's comments might, under other circumstances, be construed as improper comments on Parker's Fifth Amendment right, here, they were not; therefore, Parker has failed to show fundamental error based on the detective's comments.

Parker has failed to show a violation of his Fifth Amendment right to remain silent. Perry, 150 Idaho at 226, 245 P.3d at 978. In State v. Phillips, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007) (emphasis added), the Idaho Court of Appeals stated that "[a] prosecutor may not directly or indirectly comment on a defendant's invocation of his or her constitutional right to remain silent, either at trial or before trial, *for the purposes of inferring guilt.*" See State v. Strouse, 133 Idaho 709, 713–14, 992 P.2d 158, 162–63 (1999) (same); Doyle v. Ohio, 426 U.S. 610, 619 (1972) ("We hold that the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment."). Here, however, the prosecutor (through Detective Smith) did not comment on Parker's invocation of his right to silence in order to infer guilt.

The testimony at trial shows that Detective Heatherley interviewed Parker for about three hours, during which time Parker admitted to having touched T.S.'s penis with his mouth on two separate occasions – when Parker gave T.S. a raspberry, and when Parker subsequently demonstrated for T.S. what acts adults should not do with him. (Tr., p.317, L.17 – p.318, L.25; p.319, Ls.10-17.) Parker then repeated those

admissions separately to Detective Smith. (Tr., p.238, L.3 – p.239, L.2.) The state did not draw the jury's attention to Parker's decision to end the interview in order for it to infer guilt from his silence. Parker had already been interviewed for three hours and admitted doing two acts (albeit without sexual intent) constituting the actus reus of lewd and lascivious conduct. Instead, the prosecutor asked Detective Smith how the interview with Parker ended in order to inform the jury that the lengthy interview reached its conclusion.

In State v. Kersey, 406 So.2d 555, 559-60 (La. 1981), the Louisiana Supreme Court considered a similar case, and explained:

> In Doyle v. Ohio, 426 U.S. 610 . . . the United States Supreme Court held that because an accused's post-arrest silence is "insolubly ambiguous" and a jury is apt to draw inappropriate inferences from the fact that a defendant chose to remain silent, " . . . the use for impeachment purposes of petitioner's silence at the time of arrest and after receiving *Miranda* warnings, violated the Due Process clause of the Fourteenth Amendment." . . .
>
> In this case . . . the reference to defendant's post-arrest silence does not appear to be for the purpose of simply calling the jury's attention to it or having the jury make an inappropriate inference. When the objected to questioning is read in context with the rest of that officer's testimony, *it is clear that the reference was made in an attempt to show that the entire statement made to the officers had been provided to the jury.* According to the witness police officer, defendant was advised of his *Miranda* rights and then willingly answered a succession of questions. He made some statements that were exculpatory and some that were inculpatory in effect. *The reference to defendant's post-arrest silence arose at the close of the officer's testimony and was more a way of exploring how the interrogation was concluded than an effort to call attention to the silence.*
>
> Also, defendant's post-arrest silence did not remain "insolubly ambiguous". *Doyle v. Ohio*, *supra*. There was testimony presented which indicated that defendant answered all the officer's pertinent questions including the fact that he did not know how the damage to his car had occurred. He told the officers that he had left a nightclub sometime after

> midnight and had driven home along the same route where the victim was found. He admitted that he had been drinking at the nightclub during the evening and that he left the nightclub alone. But he stated that he had not been involved in an accident on his way home and that he did not know how the damage to his car had happened. *Thus, it was more reasonable for the jury to infer that the defendant was not, rather than that he was, avoiding giving incriminating admissions when he invoked his right to remain silent.*
>
> For the foregoing reasons and notwithstanding that the interrogation came dangerously close to offending defendant's significant constitutional right to remain silent, we feel that the defendant was not prejudiced by this reference to his post-arrest silence and a reversal of the conviction because of the reference is not warranted.

(Emphasis added); see State v. Arvie, 505 So.2d 44, 47 (La. 1987) ("[In Kersey] the defendant answered a series of questions by the police before invoking his right to remain silent, and this court held that the officer's reference to this fact merely explained how the interrogation was concluded, rather than calling attention to the silence.").

Here, as in Kersey, the invocation of the right to silence came after a full interview had been done, and it is clear that the reference to Parker's silence "was made in an attempt to show that the entire statement made to the officers had been provided to the jury" and "was more a way of exploring how the interrogation was concluded than an effort to call attention to the silence." Kersey, 505 So.2d at 47. The prosecutor did not elicit the comment about Parker's silence in order to have the jury infer guilt from that silence. The prosecutor informed the jury how the lengthy interview with Parker reached its conclusion. Moreover, it makes no sense to believe the prosecutor would have asked Detective Smith how the interview ended in order to have the jury focus on Parker's invocation of his right to silence and to infer guilt. Parker had already given a full interview and expressly admitted the acts associated with his lewd

conduct charges. Parker has failed to show a violation of his Fifth Amendment right to silence.

Because Parker has failed to show a Fifth Amendment violation of his right to silence, he cannot show that such a violation is "clear or obvious" on the record, "without the need for any additional information" including information "as to whether the failure to object was a tactical decision[.]" Perry, 150 Idaho at 226, 245 P.3d at 978. At the very least, he cannot establish that the record is "clear or obvious" in showing that the prosecutor commented on his invocation of his right to silence "for the purposes of inferring guilt[,]" rather than for the purpose of letting the jury know that the interview reached its conclusion and that it had been given Parker's entire statement. Phillips, 144 Idaho at 86, 156 P.3d at 587; see Kersey, 406 So.2d at 559-60.

Even if Parker's right to silence was violated by Detective Smith's comments about Parker ending the interview, Parker has failed to "demonstrate that the error affected [his] substantial rights," by showing a reasonable probability that the error "affected the outcome of the trial proceedings." Perry, 150 Idaho at 226, 245 P.3d at 978. The testimony and evidence presented at trial, as set forth in the Statement of Facts, supra, are relied upon to show that Parker cannot demonstrate any prejudice from the comments made by Detective Smith about Parker ending the interview. Any effect the detective's comments had on the jury would have been negligible. As noted, before ending the interview, Parker gave a full statement to the detectives and admitted committing two acts of physical contact – mouth to penis – that comprise the *actus reus* of lewd conduct. Given those circumstances, the jury would not have indulged in much

of an inference that Parker was guilty merely because he ended the interview and stopped talking after three hours of questioning.

Parker has failed to show that the prosecutor's elicitation of Detective Smith's comments about Parker terminating the interview constituted fundamental error.

4. Offering Opinion Testimony About Parker's Lack Of Truthfulness Or Guilt

Parker next claims there was objected-to error and fundamental error based on prosecutorial misconduct. Parker cites three instances in which the prosecutor allegedly offered opinion testimony by Detective Heatherley about Parker's lack of truthfulness and/or his guilt. (Appellant's Brief, pp.33-39.) Parker has failed to establish any error occurred, much less fundamental error.

(a) The Detective Did Not Opine About Parker's Guilt By Testifying That Parker's Non-Denial, When Accused Of Wrongdoing, Was A Cue He Considered

After Parker arrived for his interview with Detective Heatherley, he was given his *Miranda* rights and told "he was free to leave at any time, did not have to answer any questions or make any statements, and any time during that time he could get up and leave. He was free to go." (Tr., p.313, Ls.9-20.) Parker then gave a voluntary statement to the detective. (Tr., p.313, Ls.21-22.) After Parker initially denied any sexual wrongdoing with T.S., Detective Heatherley confronted him, asserting he was 100% certain Parker had done something with T.S. (Tr., p.316, Ls.7-16.) Parker did not deny the allegation at that point. (Tr., p.316, L.18.)

On appeal, Parker argues that Detective Heatherley improperly gave his opinion of Parker's guilt during the following colloquy concerning Parker's lack of a denial to the detective's accusation:[9]

> [PROSECUTOR]: When you are posing questions and thinking of questions, what are some of the cues that you use?
>
> What are you looking at?
>
> What are you listening to?
>
> A. Well, I'm looking at his body language. I'm looking at – or listening to his verbal – words that he is saying. I am looking mostly at his body language.
>
> Q. And during this interview, initially, what does the defendant tell you?
>
> A. That he has never had any type of inappropriate contact with the victim.
>
> Q. Did you confront him on that fact?
>
> A. Yes.
>
> Q. And what happens?
>
> A. Well, when I confronted him –and I did – I told him that I knew, 100 percent, something did happen.
>
> He said, "Okay," and let me continue. At that point he did not deny the allegation.
>
> Q. Was that a cue to you?
>
> A. Yes.

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[9] Parker does not claim that he invoked his right to silence by momentarily not responding to Detective Heatherley's accusation. Nonetheless, it should be noted that in Berghuis v. Thompkins, --- U.S.----, 130 S.Ct. 2250 (2010), the suspect refused to sign a *Miranda* waiver form and remained silent through almost three hours of interrogation before making an incriminating statement. Id. at 2255–57. The Supreme Court concluded that the suspect never unambiguously invoked his right to silence. Id. at 2260. See Salinas v. Texas, --- S.Ct. ----, 2013 WL 2922119 *6 (2013) ("Our cases establish that a defendant normally does not invoke the privilege by remaining silent.")

Q. And why is that?

A. Well, because an honest or innocent person, if they are not – have not done –

[DEFENSE COUNSEL]: Objection, Your Honor. I believe he is trying to give a conclusion about guilt or innocence.

THE COURT: At this point he hasn't. I will overrule the objection.

Q. [BY PROSECUTOR]: What – without commenting on it, what were things that – why did that work as a cue to you?

Why was that a cue to you, that he didn't deny when you confronted him?

A. Because in my training and experience, someone that – most people, when they are accused of something they didn't do, will deny it.

(Tr., p.315, L.23 – p.317, L.11; see Appellant's Brief, pp.33-34.)

Whether regarded as an objected-to claim of prosecutorial misconduct,[10] or as a claim of fundamental error based on prosecutorial misconduct, Parker's argument fails. The detective did not give his opinion about Parker's ultimate guilt. As his testimony shows, Detective Heatherley considered it a "cue" that, when directly accused, Parker did not deny sexual misconduct with T.S. The detective explained that "most people, when they are accused of something they didn't do, will deny it." (Tr., p.317, Ls.9-11.)

[10] The district court overruled defense counsel's objection to the question because the detective had not given a conclusion about guilt or innocence "[a]t this point[.]" (Tr., p.317, Ls.2-3.) However, defense counsel failed to object to the detective's subsequent testimony. Because the district court correctly ruled that there had been no testimony about Parker's guilt when defense counsel objected, if the detective's subsequent testimony presented such an opinion, counsel should have objected again. Parker has not presented any authority that would allow defense counsel's premature objection to be deemed an objection to the detective's subsequent testimony. (See Appellant's Brief, pp.35-36.)

That view of human nature is too apparent for debate.[11] The detective was not precluded from using his own understanding of human nature to help guide his interview with Parker, or from explaining the course of the interview to the jury. Parker's non-response to a direct accusation was a cue for the detective to continue his questioning of Parker, and not unthinkingly accept his initial denial.[12] Faced with the cue that Parker may have opened himself up to admitting sexual misconduct, the detective interviewed him further. The jury was entitled to know why the detective persisted to question Parker at that point. Parker has failed to show that the detective's testimony constituted his opinion of Parker's guilt.

Parker also argues, based on State v. Ellington, 151 Idaho 53, 253 P.3d 727 (2011), that Detective Heatherley improperly testified as an expert to a matter the jury should have been able to determine through its own common sense and normal experience -- that most people who are accused of a crime they did not do will deny guilt. (Appellant's Brief, pp.36-37.) Parker's reliance on Ellington is misplaced. Ellington involved allegations that the defendant used a vehicle to commit second degree murder and two counts of aggravated battery. An I.S.P. Trooper's accident reconstruction expert testimony "that there was 'not an accident' was clearly inadmissible opinion testimony on Mr. Ellington's state of mind that was not helpful to

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[11] As explained in Commonwealth v. DiNicola, 866 A.2d 329, 340 (Pa. 2005) (quoting 1 *McCormick on Evidence*, § 161, p.569 (5th ed. 1999)), "[t]he basis for permitting tacit admissions is grounded in human experience and was the same in criminal trials as in civil trials: 'as in civil litigation, admission is based upon the assumption that human nature is such that innocent persons will usually deny false accusations.'"

[12] The detective explained that upon further questioning, Parker admitted to two instances when his mouth made contact with T.S.'s penis. (Tr., p.317, L.12 – p. 318, L.25.)

the jury, and the district court abused its discretion in admitting it." Ellington, 151 Idaho at 67, 253 P.3d at 741. Ellington reaffirmed that, "[p]ursuant to I.R.E. 704, an expert's testimony is not inadmissible merely because it embraces an ultimate issue to be decided in the case; however, '[e]xpert testimony that concerns conclusions or opinions that the average juror is qualified to draw from the facts utilizing the juror's common sense and normal experience is inadmissible.'" Ellington, 151 Idaho at 66, 253 P.3d at 740 (quoting Chapman v. Chapman, 147 Idaho 756, 760, 215 P.3d 476, 480 (2009)).

In contrast to the accident reconstruction expert's testimony in Ellington, Detective Heatherley was not presented as an "expert" in any capacity during Parker's trial, much less one qualified to interpret non-responses of suspects who have been accused of criminal wrongdoing. Contrary to Parker's argument (see Appellant's Brief, p.33), neither Detective Smith's comment that Detective Heatherley had "some special training in interview skills" (Tr., p.234, Ls.7-11), nor Detective Heatherley's testimony that he had extensive training in interview techniques and had done thousands of interviews (Tr., p.311, L.19 – p.312, L.7), made him an expert in regard to a suspect's non-responses to allegations of wrongdoing. Moreover, the expert testimony in Ellington went to an ultimate issue of guilt easily determined by the jury without the officer's "expert" help – whether Ellington's collisions with another car and with a woman were accidental or intentional.[13] Here, as discussed, Detective Heatherley did not give any opinion about Parker's ultimate guilt, only that he noted Parker failed to respond to a direct accusation the way most people do when wrongly accused.

[13] In Ellington, the I.S.P. officer based his expert opinion that the collisions were intentional instead of accidental upon his finding that Ellington had taken no evasive actions. Ellington, 151 Idaho at 66 n.10, 253 P.3d at 740 n.10.

In sum, Parker has failed to show Detective Heatherley's testimony constituted an opinion about Parker's guilt. Parker has also failed to show that Ellington is relevant to his case because Detective Heatherley did not give any "expert" testimony, and his testimony did not invade the jury's province. Parker has failed to show any error, much less fundamental error, in the detective's testimony.

(b) Because Parker's Counsel Asked Detective Heatherley Whether Parker Was Cooperative During The Interview, Parker Cannot Complain On Appeal That The Detective's Response Was Improper Or Otherwise Violative Of His Constitutional Rights

Parker's next claim that Detective Heatherley offered opinion testimony about his guilt centers on the following exchange during cross-examination:

> Q. And these are primarily – these interviews are primarily interrogations of suspects, correct?
>
> A. It starts out as interview until I deem that I think that the subject is not being truthful, then, yes, it can turn into interrogation.
>
> Q. Would this qualify as an interrogation, what we saw?
>
> A. No.
>
> Q. Okay. So he was being cooperative with you the entire time then?
>
> A. Well, he was being cooperative, but he was lying to me about certain things.
>
> Q. Okay. So when does it switch from interview to interrogation?
>
> You have distinguished –
>
> A. Yes.
>
> Q. -- cooperation from lying.
>
> A. Yes.

Q. Okay. What would be noncooperation if lying, in your mind, is not noncooperation?

A. No, I didn't say lying wasn't – well, yeah, lying is noncooperation.

(Tr., p.326, L.9 – p.327, L.10; see Appellant's Brief, p.34.)

Detective Heatherley's answer to defense counsel's questions was not an improper opinion on Parker's guilt. Whether Parker had been cooperative with the detective during the interview was answered affirmatively with the proviso that Parker had been lying about certain things. As the detective explained, being asked whether Parker had been cooperative incorporated the question of whether Parker had been lying because "lying is noncooperation." (Tr., p.327, Ls.9-10.)

Inasmuch as Parker's trial counsel invited Detective Heatherley to testify about whether Parker was cooperative during the interview, the detective's testimony that Parker "was being cooperative, but he was lying to me about certain things" was invited.[14] See State v. Drennon, 126 Idaho 346, 350, 883 P.2d 704, 708 (Ct. App. 1994) (defense counsel opened the door for prosecutor to ask witness for explanation of what "theatrical" meant). As a result, any error in the detective's testimony cannot be considered on appeal even under the doctrine of fundamental error. State v. Caudill, 109 Idaho 222, 226, 706 P.2d 456, 460 (1985) ("We will not reverse for the reason that one may not successfully complain of errors one has consented to or acquiesced in. In other words, invited errors are not reversible.").

[14] Although the invited error doctrine precludes Parker from complaining about the answer his counsel's question fairly elicited, the state also points out that the detective's testimony that Parker lied to him during the interview "about certain things" (Tr., p.326, Ls.21-22) is not tantamount to giving an opinion about Parker's guilt.

(c) Detective Heatherley's Testimony That He Uses Themes During Interviews Did Not Constitute An Opinion On Parker's Guilt

Parker next asserts that Detective Heatherley improperly commented on his "perception as to Mr. Parker's truthfulness" by answering the prosecutor's question of what his goal is with using interview themes. (Appellant's Brief, pp.34-35; see Tr., p.336, Ls.4-5.) However, the detective answered by explaining in broad generalities what his interview strategy is:

> When an individual is there and has lied to me, from what I'm seeing, I take it that he is lying about the incident that the victim has alleged. What I'm wanting to do is have that person begin to talk to me about it, and I try to minimize it so that later on he will come out with the truth.

(Tr., p.336, Ls.6-12.)

Detective Heatherley's answer did not give his opinion of Parker's truthfulness or guilt. He explained what he generally attempts to do in police interviews – nothing was specifically linked to Parker. See State v. Critchfield, 153 Idaho 680, 290 P.3d 1272, 1276 (Ct. App. 2012) ("[T]he offer of proof regarding Dr. Wilson's proposed testimony did not include any such prohibited opinion on the credibility of any victim witness or on Critchfield's guilt. . . . The defense made it clear that Dr. Wilson would not be asked to give an ultimate opinion that any individual victim's testimony was tainted or not credible.") Parker has failed to show any error, much less fundamental error, in Detective Heatherley's testimony about his interview themes and strategy.

(d) None Of Parker's Three Claims Of Improper Opinion Testimony By Detective Heatherley Constitute Fundamental Error

As shown, none of the three instances Parker claims were improper opinions of his guilt constitute error (or, as alleged, prosecutorial misconduct), much less a violation of an unwaived constitutional right, as required for demonstrating fundamental error under Perry. 150 Idaho at 226, 245 P.3d at 978. Because there are no errors, Parker has failed to meet the second requirement for fundamental error under Perry – showing that a constitutional error is "clear or obvious" on the record, "without the need for any additional information" including information "as to whether the failure to object was a tactical decision[.]" Id. Lastly, Parker has failed to meet his burden of showing a reasonable probability that any of the errors he alleges "affected the outcome of the trial proceedings." Id. The testimony and evidence presented at trial, as set forth in the Statement of Facts, supra, are relied upon to show that Parker has failed to demonstrate any prejudice.

5. Appealing To Juror Sympathy And Passion

(a) Introduction

During trial, Joy Heinbach testified that when she was baby-sitting for T.S., she observed T.S. when he was apparently having a nightmare; he was in a fetal position, shaking, and saying things that caused her to be concerned enough that she reported it to his mother and the police. (Tr., p.298, L.19 – p.300, L.18.) The prosecutor referred to the fact that T.S. suffered a nightmare which was related to Parker's sexual misconduct during his opening statement and closing arguments. [15]

[15] During his opening statement, the prosecutor said:

Parker claims fundamental error based on the prosecutor's allegedly improper appeal to the sympathies and passions of the jury by making T.S.'s nightmare the overriding theme of the state's case. (Appellant's Brief, pp.39-44.) Parker alleges:

> [T]he prosecutor made much of T.S.'s alleged "sleep talk" during a nightmare. This nightmare, as it turns out, was not just a vehicle to get T.S.'s "sleep talk" in front of the jury; it also provided a convenient metaphor which allowed the prosecutor to appeal to the passions and prejudices of the jurors. Indeed, it provided a metaphor which allowed the prosecutor to book-end his case with emotional pleas.

(Appellant's Brief, p.39.)

> Folks, when [T.S.] called out from his nightmare, at that point his mother, Vanessa, knew she needed to act. She called the police, and that began the charges that bring you here today.
>
> What was the nightmare?
>
> Well, as the police investigation unfolds, it becomes clear that the nightmare is that the defendant, Russell Parker, sexually molested [T.S.], a three-year-old boy. And he did that by placing the three-year-old's penis in his mouth. And he did it more than once.

(Tr., p.192, Ls.14-24.)

In his closing argument, the prosecutor stated:

> Folks, you have heard now the nightmare, you have heard about the nightmare, and you know the nightmare that's been in [T.S.'s] and [T.S.'s] family life over the, basically almost a year now.
>
> No child should have to suffer his way. No kid should have to wake up from a nightmare because of what this man did to him.

(Tr., p.387, Ls.5-12.)

During his rebuttal argument, the prosecutor concluded, "[a]nd now it is your time to hold him accountable, to end the nightmare." (Tr., p.407, Ls.22-23.)

Parker's claim fails on the record to show fundamental error. The arguments singled out are either entirely proper or fall far short of being of constitutional significance; are not clear on the record; and did not result in prejudice.

(b) Parker Has Failed To Demonstrate Fundamental Error

Appeals to emotion, passion or prejudice of the jury through use of inflammatory tactics are impermissible. State v. Raudebaugh, 124 Idaho 758, 769, 864 P.2d 596, 607 (1993). However, prosecutors have considerable latitude in closing argument and have the right to discuss the evidence and the inferences and deductions arising from therefrom. State v. Sheahan, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003). The purpose of the prosecutor's closing argument is to enlighten the jury and help the jurors remember and interpret the evidence. State v. Reynolds, 120 Idaho 445, 450, 816 P.2d 1002, 1007 (Ct. App. 1991). In reviewing a claim of improper argument by a prosecutor "'a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.'" State v. Severson, 147 Idaho 694, 719, 215 P.3d 414, 439 (2009) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974)). Likewise, arguments should be evaluated in light of defense conduct and the context of the entire trial. Id. Prosecutorial misconduct in closing argument will be considered a fundamental error when it is "calculated to inflame the minds of jurors and arouse passion or prejudice against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt on factors outside the

evidence." State v. Porter, 130 Idaho 772, 785, 948 P.2d 127, 140 (1997) (quoting State v. Babb, 125 Idaho 934, 942, 877 P.2d 905, 913 (1994)).

Parker claims the prosecutor appealed to the passions and prejudices of the jury by making T.S.'s nightmare a theme and by explaining that the nightmare was related to Parker's sexual misconduct. (Appellant's Brief, pp.39-44.) Contrary to Parker's argument, it was entirely appropriate for the prosecutor to use evidence presented at trial (T.S.'s nightmare) and reasonable inferences from that evidence (that T.S.'s nightmare was related to Parker's sexual misconduct), as a theme for the state's case. Even if the prosecutor's comments are viewed as inappropriate in some way, they do not come close to establishing fundamental error.

Joy Heinbach testified at trial that T.S. had a nightmare which caused her to report it to T.S.'s mother and the police. (Tr., p.298, L.19 – p.300, L.18.) Because the fact of T.S.'s nightmare was presented to the jury as evidence during trial, the prosecutor was entitled to discuss that evidence and the reasonable inferences to be derived from it. Sheahan, 139 Idaho at 280, 77 P.3d at 969. As noted (see II, §§ 1(b), 2(b), supra), the jury would have been able to reasonably infer, based on the concerns and responses by Joy Heinbach and T.S.'s mother, that T.S.'s nightmare was related to sexual misconduct by Parker. Inasmuch as the prosecutor's opening statement and closing arguments were based on evidence actually presented at trial, and reasonable inferences from the evidence, Parker has failed to show that the prosecutor's comments were improper in any way.

Moreover, Parker cannot show that the prosecutor's comments violated his constitutional rights by demonstrating that they were "calculated to inflame the minds of

jurors and arouse passion or prejudice against the defendant," or were "so inflammatory that the jurors may be influenced to determine guilt on factors outside the evidence." Porter, 130 Idaho at 785, 948 P.2d at 140; Babb, 125 Idaho at 942, 877 P.2d at 913. Arguing the "nightmare" theme, telling the jury that T.S. and his family had been through a nightmare, stating that no child should have to wake up from a nightmare because of what Parker did, and asking the jury to end the nightmare (see n. 15, supra), could not come close to impassioning or inflaming a jury already presented with Parker's confession that he had placed his mouth on T.S.'s penis two times – first, in giving T.S. a raspberry, and second, to demonstrate to T.S. what it is that adults should *not* be allowed to do with him. Parker has thus failed to show constitutional error.[16]

Second, even assuming the comments were improper, Parker cannot show that his counsel's decision not to object to the comments was not tactical. For example, Parker's counsel may have chosen to avoid drawing further attention to the fact that T.S. had a nightmare which the jury could reasonably infer was connected to sexual misconduct by Parker. Or, Parker's counsel may not have found the prosecutor's comments inflammatory because they appeared to have been based on the evidence presented at trial and reasonable inferences drawn from the evidence. Parker is not entitled to a presumption that his counsel's decision was not tactical, particularly where, as here, there are reasonable bases for not objecting.

Finally, even if Parker can satisfy the first two prongs of Perry, any such error was harmless. Parker cannot show that the jury would have acquitted him if not for the

[16] Parker has not presented any legal support for the idea that the prosecutor was not entitled to use a matter established through testimony at trial – here, that T.S. had a nightmare – as an overarching theme for the state's case.

prosecutor's comments during opening statement and closing argument concerning T.S.'s nightmare. The testimony and evidence presented at trial, as set forth in the Statement of Facts, supra, are again relied upon to show that Parker has failed to demonstrate any prejudice.

6. Conclusion

All of what Parker claims is prosecutorial misconduct is entirely proper and does not constitute fundamental error. Even if some aspects of the prosecutor's actions might have drawn an objection, they fall far short of constitutional error. Likewise, none of the complained of acts of prosecutorial misconduct is plain or obvious on the record either because Parker ascribes the worst possible interpretation or because lack of an objection could have been the result of tactical decisions of trial counsel. Finally, Parker has completely failed to establish prejudice.

III.
Parker's Claim Of Cumulative Error Is Meritless

Under the doctrine of cumulative error, a series of trial errors, harmless in themselves, may in the aggregate show the absence of a fair trial. State v. Martinez, 125 Idaho 445, 453, 872 P.2d 708, 716 (1994). A necessary predicate to application of the cumulative error doctrine is a finding of more than one error. State v. Hawkins, 131 Idaho 396, 958 P.2d 22 (Ct. App. 1998). The cumulative error analysis does not include errors neither objected to nor found fundamental. State v. Perry, 150 Idaho 209, 230, 245 P.3d 961, 982 (2010). Because finding fundamental error requires reversal without

regard to cumulation, and because Parker has raised on appeal only one preserved claim of error, by definition the cumulative error doctrine does not apply in this case.

CONCLUSION

The state respectfully requests that this Court affirm the judgment and sentence entered upon the jury verdict finding Parker guilty of lewd and lascivious conduct.

DATED this 19th day of June, 2013.

JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 19th day of June, 2013 served a true and correct copy of the attached RESPONDENT'S BRIEF ON REVIEW by causing a copy addressed to:

ERIK R. LEHTINEN
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in the State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

John C. McKinney
Deputy Attorney General

JCM/pm